SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

Affidavit in Opposition

----------X

AFFIDAVIT OF JAMES C. OWEN REGARDING ANSWERING AFFIDAVITS IN OPPOSITION TO EVEREST REINSURANCE COMPANY'S MOTION TO MODIFY INJUNCTION

State of Missouri)
ss)
County of St. Louis)

BEFORE ME, the undersigned Notary, Elizabeth Faires, on this 31st day of August, 2006, personally appeared James C. Owen, known to be a credible person and of lawful age, who being by me first duly sworn on his oath, deposes and says:

I, James C. Owen, an attorney duly admitted to practice before the Courts of the State of New York, attests under penalty of perjury as follows:

1. I am a partner in the law firm of McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C., 400 S. Woods Mill Rd., Suite 250, Chesterfield, MO 63017 (314) 392-5200, special counsel to Midland Insurance Company in Liquidation ("Midland"). I am admitted to practice law in the State of New York.

2. I have prepared the accompanying Memorandum in Opposition to Everest Reinsurance Company's Motion to Modify the Injunction filed simultaneously with this Affidavit. There is no valid reason based in fact or law for the Court to modify this

Court's permanent injunction to permit Everest Re to file a complaint against the Liquidator of the Midland estate.

~~3. Annexed hereto as Exhibit A is the Affidavit of Andrew Stuehrk, sworn to on August 31, 2006 in Support of Midland's Memorandum in Opposition to Everest Reinsurance Company's Motion to Modify the Injunction.~~

~~4. Annexed hereto as Exhibit B is the Affidavit of Geri L. Howard sworn to on August 31, 2006 in Support of Midland's Memorandum in Opposition to Everest Reinsurance Company's Motion to Modify the Injunction.~~

Dated: New York, New York
September 1, 2006

James C. Owen, Esq.
McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C.
400 South Woods Mill Rd., Suite 250
Chesterfield, MO 63017
(314) 392-5200
(314) 392-5221 (Facsimile)

Subscribed and sworn to before me this 31st day of August, 2006

[Seal]

Notary Public 4-18-08

ELIZABETH J. FAIRES NOTARY SEAL NOTARY PUBLIC STATE OF MISSOURI

Notary Public
My Commission Expires:

ELIZABETH J. FAIRES
Notary Public - State of Missouri
ST. LOUIS COUNTY
My Commission Expires April 18, 2008

INDEX NO.: 41294 YEAR 1986

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

In The Matter of

The Liquidation of

MIDLAND INSURANCE COMPANY

AFFIDAVIT OF ANDREW STUEHRK

MEMORANDUM IN OPPOSITION TO EVEREST REINSURANCE COMPANY'S MOTION TO MODIFY THE INJUNCTION TO PERMIT SUIT AGAINST THE LIQUIDATOR

JAMES C. OWEN, ESQ.
Attorney for Superintendent of Insurance as Liquidator

Office and Post Office Address, Telephone

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McGOVERN, STRILER & MENGHINI, L.C.
400 SOUTH WOODS MILL ROAD, SUITE 250
CHESTERFIELD, MO 63017

ATTORNEY CERTIFICATION

The undersigned, an attorney admitted to practice in the courts of New York state, certifies that upon information belief and reasonable inquiry the contentions in the above referenced document(s) are not frivolous.

Dated: September 1, 2006
New York, New York

James C. Owen

Yours etc.

JAMES C. OWEN, ESQ.

Attorney for Superintendent
Of Insurance as Liquidator

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

THE LIQUIDATOR'S MEMORANDUM IN OPPOSITION TO EVEREST RE'S MOTION TO MODIFY THE COURT'S INJUNCTION TO PERMIT SUIT AGAINST THE LIQUIDATOR

I. INTRODUCTION

Everest Reinsurance Company's ("Everest Re")[1] motion to modify this court's injunction is wholly without merit. The accusations made against the Liquidator and his counsel and consultants are patently false, unprofessional, outrageous and without any factual basis. These unfounded assertions are extremely serious and, of necessity, will be taken as such in all future dealings between the parties. The Court must keep in mind that this is the only reinsurer out of hundreds in the Midland estate, including many with whom the Liquidator has settled, that has ever leveled these types of allegations. However, the allegations need go nowhere beyond the filing stage, as the motion must be summarily denied.

In short, Everest Re wants to be involved every step of the way in Midland's claims process. Midland's claims can generally be broken down into four (4) groups: 1) the Asbestos bodily injury (BI) claims that make up well over 50% of Midland's liabilities, which claims are currently involved in proceedings before this Court with a Case Management Order in place ("the Disputed Claims Proceedings"); 2) a variety of past-due claims that have been billed to Everest Re and remain unpaid; 3) claims that Midland has informed Everest Re and other reinsurers that it intends to allow in the near future but seeks comments from the reinsurers prior

[1] Everest Reinsurance Company was formerly known as Prudential Reinsurance Company.

to formally allowing the claims and submitting them to the Court for approval; and 4) claims upon which Midland has case reserves or Incurred But Not Reported (IBNR) reserves for future claims that may or may not be allowed.

Everest Re's allegations that the Liquidator has engaged in bad faith claims tactics are counterintuitive at the very least in light of the Disputed Claims Proceedings that are pending in front of this Court involving the resolution of over $1 billion in asbestos BI claims in which Everest Re is not only participating, but over which it has the ability to control the destiny of said claims. This is a proceeding initiated by the Liquidator in which he has not allowed the claims but, rather, has invited the reinsurers into the proceedings and asked the Court decide the outcome of the largest and most complicated claims in the liquidation estate. The Liquidator's actions fly in the face of all of Everest Re's allegations. Thus, there is absolutely no reason for this Court to lift the permanent injunction order with respect to this first category of asbestos BI claims.

As to the second category of claims that have been *allowed* by Midland Liquidator, approved by this Court without objection by any of Midland's hundreds of reinsurers (including Everest Re), and billed to Everest Re, these issues can easily be resolved by this Court in a reinsurance collections lawsuit that the Liquidator will bring at the appropriate time if Everest Re continues to refuse to pay these claims. If Everest Re believes that it has valid defenses to the non-payment of these claims under the terms of the reinsurance contracts, the Liquidator has full confidence that this Court will resolve all such defenses in this proceeding. These reinsurance collections actions have been the proper forum for reinsurers to assert such defenses for hundreds of years and should not be changed for one reinsurer.

The third and fourth category of claims involves actions the Liquidator *might* take on *future* claims (e.g. the Pfizer claims). The third category involve claims where the Liquidator has specifically asked for the reinsurers input before making an allowance by means of a "Claims Alert" issued to all reinsurers - - hardly a sign of bad faith by the Liquidator. Indeed, as discussed in detail *infra*, this notice from Midland triggers a number of options for the reinsurers, the last resort of which is to object to the allowance when the Liquidator asks for approval by this Court. If an objection is filed, the Court can rule on whether Everest Re (or any other reinsurer) has raised a legitimate defense that should prevent the allowance from going forward. The fourth and last category of claims involves those upon which no action by Midland other than monitoring is taking place. Midland gives the reinsurers advice on these claims and the reinsurers can audit the files on a regular basis and provide input and their own advice at any time.

It should be obvious that Everest Re's motion to lift the injunction is not the proper method for this court to resolve such an issue. It is axiomatic that a declaratory judgment action is not a procedure to issue advisory opinions as to possible future actions a party may or may not take. This is exactly what Everest Re's draft Complaint requests, as it requests that the Liquidator provide Everest Re with two basic areas of relief (not including the obligatory request for anticipatory breach of contract): 1) "timely notice" of actions the liquidator takes on claims; and 2) an opportunity "to participate in the claim-allowance process," including instructing the Liquidator as to what defenses the Liquidator should assert.

However, New York law is very specific as to the role of a reinsurer in the claims process in this situation. This is detailed below in the Section on "Follow-the-Settlements." Moreover, "the insolvency clause" of the reinsurance contract between the parties has a provision for the

reinsures to "interpose defenses" that does not require the lifting of the injunction, as it provides, in the aptly-named "Insolvency Clause:"

> [T]he **Reinsurer** may investigate such claim and interpose, **at its own expense**, in the proceeding where such claim is to be adjudicated, any defense or defenses that it may deem available to the Company or their liquidator, receiver, conservator or statutory successor. The expense thus incurred by the Reinsurer shall be chargeable, subject to the approval of the court, against the Company as part of the expense of conservation or liquidation to the extent of a pro rata share of the benefit which may accrue to the Company solely as a result of the defense undertaken by the Reinsurer.
>
> *When two or more Reinsurers* are involved in the same claim and a majority in interest elect to interpose defense to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance Agreement as though such expense had been incurred by the Company.

(Emphasis added.) Thus, in the very contract upon which Everest Re bases its many arguments, and in the very section that was triggered and became controlling when Midland was adjudicated insolvent by the Liquidation Court, Everest Re is told what it can do if it so desires to contest a claim. It "may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated, any defense or defenses that it may deem available to the ... liquidator...." If it can enlist another reinsurer to join with it and "a majority" "elect" to take certain action, it can "apportion" such expenses according to the reinsurers' respective shares of the risk. [2]

Everest Re has the option right now to intervene in the Disputed Claims Proceedings involving the Asbestos BI claims and it may seek a determination as to its rights in that proceeding under the insolvency clause. To-date, Everest Re has simply sent the Liquidator amorphous, ambiguous letters concerning certain policyholder's claims requesting actions that

[2] Everest Re cites to language that suggests that it has the right to "control" the claims process in some fashion, but that word is contained in only a limited number of facultative certificate contracts, not in any of the treaties, and is in the "notice" provision, not the "Insolvency Clause". Everest Re's quotation to the provision is wholly out of context.

benefit its parochial interests irrespective of the interests of the Midland estate, the policyholders or even the other reinsurers of Midland. (A sample of one of these letters is attached as Exhibit 1.)

Moreover, when Everest Re challenges Midland's claims handling in open court on a particular claims file if it files an objection to a claims allowance or in defense of Midland's collection action, and Midland is allowed to present evidence as to all of the risk factors associated with the claims at issue and all of the reinsurers on each risk, the Court will discover many facts and legal principles that Everest Re has not shared with the Court in its Memorandum. For instance, a reinsurer cannot second-guess a cedent's claims handling, but must "follow the settlements." *North River Insurance Co. v. ACE American Reinsurance Co.*, 361 F.3d 134, 139 (2d Cir. 2004); *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America*, 419 F.3d 181, 193 (2d Cir. 2005). Midland will also present evidence that Everest Re has in fact paid many of the claims it challenges in its "poison pill letters" to Midland in its other insurance capacities, i.e. as a direct insurer (Mt. McKinley, Gibraltar, etc.). Everest Re has also paid these same claims (Pfizer, Bristol Myers, etc.) as a reinsurer for other cedents (e.g. it paid Transit Casualty and many other cedents' the same claims that Midland is asserting).

Moreover, Everest Re is <u>not</u> the only reinsurer on these claims, but is one of hundreds of reinsurers on the many claims of Midland. Many reinsurers would be happy to entertain a "buy-out" of the Pfizer claims for instance; others are contemplating the same. As the Court knows, many reinsurers have "commuted" these claims already. Moreover, if Everest Re offers defenses to certain policyholders' claims and the Liquidator chooses to take the advice of Everest Re, what occurs if that advice is inimical to the interest of another reinsurer? Midland's reinsurers are hardly of one voice (e.g. they were not even able to form a committee in the Disputed Claims

proceeding, but, instead, have a committee of "all reinsurers"). What if another reinsurer decides that the interpretation of some of the many questions of law at issue in *In re Liquidation of Midland Insurance Company*, 709 N.Y.S.2d 24 (2000) *("LAQ")* is favorable to it on many issues but not on other areas?

Further, the primary obligation of the Midland liquidator is to accumulate, preserve and distribute the assets of the estate and the Liquidator's decisions are made with that in mind. *Serio v. Hevesi*, 9 Misc.3d 835, 841, 804 N.Y.S.2d 571, 578, 2005 N.Y. Slip Op. 25319. (2005), *citing Matter of Transit Cas. Co. [Digirol, Superintendent of Ins.]*, 79 N.Y.2d 13, 20-21, 580 N.Y.S.2d 140, 588 N.E.2d 37 (1992). Everest Re is not a reinsurer on every risk and therefore not a partner with interests identical to those of the Midland creditors. Consequently, positions argued by Everest Re on the claims they reinsure may be damaging to the greater interests of the Midland creditors and even inimical to the interests of other reinsurers.

The bottom line is that the Liquidation Order of this Court imposes a permanent injunction against policyholders and a list of many others, which includes Everest Re, as it provides that "all other persons ... are permanently enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, ... against the said corporation or its estate, or the Superintendent and his successors in office, as Liquidator thereof ...." *See also* Insurance Law § 7419(b) (authorizing this injunction). This injunction has not been lifted in over 20 years and should not be lifted in this situation as there a mechanism already exists to resolve each and every issue that Everest Re has or may have.

II. ARGUMENT

A. Reinsurance Contracts – Follow the Fortunes and Settlements

Reinsurance provides indemnity to a primary insurer for losses it pays to its policyholders. *Kemper Reinsurance Co. v. Corcoran*, 79 N.Y.2d 253, 258 (1992). There are two types of reinsurance contracts: "Treaty reinsurance is obtained in advance of actual coverage and may cover any risk the primary insurer covers. The contract is formed when the primary insurer "cedes" part of the premiums for its policies and the losses on those policies to the reinsurer. A facultative reinsurance contract is one obtained to cover a particular risk. The reinsurer does not assume liability for losses paid in either case; its only obligation is to indemnify the primary insurer." *Id.* Midland has entered into both types of reinsurance contract with Everest Re (the "Midland Contracts").

The Midland Contracts all contain a "follow the settlements" provision. The treaty contracts contain the following provision:

> In the event of an occurrence which either results in or appears to be of serious enough nature as probably to result in a loss involving this Agreement, the Company shall give notice as soon as reasonably practicable to the Reinsurer through Guy Carpenter & Company, Inc., 110 William Street, New York, New York 10038. **Any and all payments made by the Company in settlement of loss or losses under the original policy or policies, whether in payment of an award or verdict or in satisfaction of a judgment in any Court against the insured or the Company or made voluntarily by the Company before judgment, in full settlement or as a compromise, shall be unconditionally binding upon the Reinsurer and amounts falling to the share of the Reinsurer shall be immediately payable to the Company by it upon reasonable evidence of the amount paid or payable by the Company being presented to Guy Carpenter & Company, Inc., by the Company.** [Emphasis added.]

The facultative certificates contained the following provision:

> 4. **All claims covered by this reinsurance when settled by the Company, shall be binding on PRUDENTIAL REINSRUANCE** which shall be bound to pay its proportion of such settlements. In addition, PRUDENTIAL

> REINSURANCE shall pay its proportion of expense (other than Company salaries and office expenses) incurred by the Company in the investigation and settlement of claims or suits as follows:
>
> (a) With respect to reinsurance provided on an excess of loss basis, in the ratio that PRUDENTIAL REINSURANCE's loss payment bears to the Company's gross loss payment;
>
> (b) With respect to reinsurance provided on a pro rata (or quota share) basis, in the ratio that PRUDENTIAL REINSURANCE's limit of liability bears to the Company's gross limit of liability. [Emphasis added.]

The "follow the fortunes" doctrine "binds a reinsurer to accept the cedent's good faith decisions on all things concerning the underlying insurance terms and claims against the underlying insured: coverage, tactics, lawsuits, compromise, resistance or capitulation." *North River Ins. Co. v. Ace American Reinsurance Co.*, 361 F.3d 134, 139-40 (2d Cir. 2004). "While the reinsurer is not required to pay for losses that are not covered under the underlying policy, **'[a] reinsurer cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decision to waive defenses to which it may be entitled.'"** *National Union Fire Ins. Co. of Pittsburgh, PA v. American Re-Insurance Co.*, 2006 WL 2089578 (S.D.N.Y. 2006), slip op at *3, *quoting Christiana Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 280 (2d Cir. 1992), *cited in Int'l Surplus Lines Ins. Co. v. Certain Underwriters & Underwriting Syndicates at Lloyd's of London*, 868 F.Supp. 917, 921 (S.D. Ohio 1994). [Emphasis added.] **In order to prove that the reinsured's actions were made in bad faith, the reinsurer must make an "extraordinary showing of a disingenuous or dishonest failure."** *TIG Ins. Co. v. Newmont Mining Corp.*, 413 F.Supp.2d 273, 284-285 (S.D.N.Y. 2005). (Emphasis added.) It is even more difficult when the chief complaint is that the reinsured's actions will "maximize" reinsurance.

> Cases in which reinsurers allege bad faith usually involve a cedent's alleged failure to notify the reinsurer of coverage changes, as required in the reinsurance

> certificate, or a cedent's decision to settle with the underlying insured. Here Gerling's complaint is not that Traveler's failed to notify it of material facts, or even that Travelers' settlement with OCF was somehow improper. Instead, Gerling complains that-after entering into a settlement in which the occurrence issue was deliberately left unresolved and to which Gerling had no objections-Travelers, when faced with multiple potential allocations of the settlement amount, chose an allocation that evinced bad faith. Reinsurers raising such claims will generally face a heavy burden; a cedent choosing among several reasonable allocation possibilities is surely not required to choose the allocation that *minimizes* its reinsurance recovery to avoid a finding of bad faith. [Emphasis in original; citations omitted.]

Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America, 419 F.3d at 193. This does not change simply because Midland is in insolvency. It is, in fact, a priority for the Liquidator to collect the maximum amount of assets for the benefit of Midland's creditors.

B. New York Liquidations

The New York statutes relative to liquidation of insolvent insurance companies are intended to, and do, furnish a comprehensive, economical and efficient method for the winding up of the affairs of domestic insurance companies by the Superintendent of Insurance for the benefit of all the creditors. *Motlow v. Southern Holding & Securities Corp.*, 95 F.2d 721, 724 (8th Cir. 1938). Pursuant to these statutes and the Order of Liquidation, the Superintendent has been given the authority to take control and possession of the assets of the insolvent company in order to prevent waste of the assets and the consequent loss that would fall upon a large number of people without practical power to protect their rights. *Bean v. Stoddard*, 207 A.D. 276, 279 (4th Dept. 1923).

> The purpose of a liquidation proceeding is to preserve all available assets for the benefit of creditors and to protect the interest of persons who purchased policies from a company that has become insolvent. (*Matter of Transit Cas. Co. [Digirol, Superintendent of Ins.]*, 79 N.Y.2d 13, 20-21, 580 N.Y.S.2d 140, 588 N.E.2d 37 [1992]). "[T]he general rule is that a Liquidator of an insurance company 'stands in the shoes' of the insolvent ..." (*Corcoran v. 43 West 61st St.*, 234 A.D.2d 120, 122, 651 N.Y.S.2d 436 [1st Dept. 1996]) (internal quotation omitted). The Superintendent as liquidator is similar to a statutory receiver (*Matter of Kinney,*

> 257 App.Div. 496, 498, 14 N.Y.S.2d 11 [3rd Dept. 1939], *aff'd* 281 N.Y. 840, 24 N.E.2d 494). While the Superintendent supercedes and acts in place of officers and stockholders to control the corporate affairs of an insurer in liquidation, only legal title of the property of the insolvent insurer passes to the control of the Superintendent. (*id.* at 498-99, 14 N.Y.S.2d 11). Equitable title remains for ultimate distribution to creditors and policyholders. (*id.*).

Serio, supra, 9 Misc.3d at 841. To effect his duties, the Liquidator has been ordered to take control of "all of the property, licenses, corporate charters, contracts and rights of action of MIDLAND pursuant to Section 7405 of the Insurance Law". To assist the Liquidator, this court

> ORDERED, that the officers, directors, trustees, policyholders, agents and employees of MIDLAND, and all other persons, including but not limited to claimants, plaintiffs and petitions who have claims against MIDLAND are **permanently enjoyed and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against the said corporation or its estate**, or the Superintendent or his successors in office, as Liquidator thereof, or from making or executing any levy upon the property or estate of said corporation, **or from in any way interfering with the Superintendent, or any successor in office, in his possession or in the discharge of his duties as liquidator thereof, or in the liquidation of the business of said corporation** ... [Emphasis added.]

Everest Re asserts that the injunction issued by this Court pursuant to § 7419(b) should be amended to allow it to file a declaratory judgment action against Midland's estate. This is not an action that should be lightly granted. Everest Re cites to several cases that involve insolvency but are not on point. The closest to the current situation was *Bean, supra*, in which Bean, the receiver of a Massachusetts bank sought leave to bring an action against the New York Superintendent of Insurance, as liquidator of Niagara Life Insurance Company, in federal court. In that case, the order authorizing liquidation also had a provision that "all persons were restrained from bringing or prosecuting any suit against the insurance company or interfering with its assets, or with the Superintendent of Insurance." *Id.*, 207 A.D. at 278. The bank receiver's claim was that bonds that were being held by the insolvent insurer were not, and never

had been, assets of the estate. The receiver argued that he should not have to wait for the slow course of the liquidation proceedings in order to obtain his property.

The New York Supreme Court found, mainly, that jurisdiction lay with the New York state courts and should not have been granted to the federal court. As to the receiver's question, the court stated:

> The property in the possession of the company when taken by the Superintendent was impressed with a trust. The title to some of the property was in dispute. By the provisions of section 63 of the Insurance Law, the authority of the Superintendent to take and hold the assets was by virtue of an order of the Supreme Court. **We recognize the fact that if the property of petitioner was taken illegally or by mistake and commingled with the assets of the company, neither the Superintendent nor the creditors have any right to retain it. The petitioner is entitled to a speedy adjudication of his claim without waiting for the Superintendent to ascertain liabilities and marshal and distribute assets, ordinarily a protracted process.** The Supreme Court granted an injunction on the application of the Superintendent for the purpose of permitting him to proceed with liquidation without being harassed by suits or claims of policyholders or stockholders. It had the unquestioned right to modify or vacate the injunction in the interest of justice to individuals who had claims distinct from those already stated.

Id. at 280. [Emphasis added.] Everest Re does not require a modification of Midland's injunction "in the interest of justice to individuals who had claims distinct from those already stated." None of its property has been taken, legally or illegally, by Midland. In fact, it is refusing to pay on valid claims.

Everest Re's other accusations in its brief are non sequiturs. For example -- what else would Everest Re have the Liquidator do ... not maximize the assets of an insolvent estate? All bankruptcy trustees and insurance insolvency special deputies are charged with bringing in all assets of the estate – pure and simple. Of course they must do so in good faith. If the Liquidator allows an invalid policyholder claim in the hope of recovering reinsurance, this would not be proper. The question is -- what is an "invalid claim?" Everest Re accuses the Liquidator of

stating in his December 2005 Court Report (approved by this Court) that the primary asset of the Midland estate is reinsurance recoveries. Again, once the Liquidator collected return premiums and other miscellaneous assets almost two decades ago, the only recoverable assets of the Midland estate are reinsurance on the insurance claims. Everest Re must believe that the Supervising Court has absolutely no idea as to how an insurance insolvency operates if it hopes to "fool" this Court into believing that the Liquidator is somehow acting in bad faith by maximizing assets and pursuing reinsurance recoveries unless it has clear and convincing evidence that the claims the Liquidator has allowed, on a claim-by-claim basis, are not covered by the reinsurance contracts, under the governing decisional law set forth above.

C. Midland's Claims Handling is Reasonable

Everest Re's specific reasons for wanting to modify the injunction include (1) improper claims handling, including lack of notice; and (2) failure of Midland to provide claims information. As already stated, however, these arguments are unjustified to the point of absurdity.

1. Notice

In 2004, the Midland liquidator hired consultants to review all open major policyholder claims and prepare comprehensive "Captioned Reports" that summarized the facts of each claim, contained an evaluation (including a recommended allowance and/or case reserve) based on the information then available and outlined a strategy for bringing each claim to a conclusion. These Captioned Reports were sent to the reinsurers shortly after they were completed, giving Everest Re and other reinsurers ample time (in all but one case nearly two years or more) to provide any input they felt would be useful in bringing the claims to a conclusion.

2. "Allowed" Claims

More than one-year ago, a process was started at Midland whereby thirty to forty-five days prior to an allowance, a "Claim Alert" is mailed out to reinsurers who may be affected by the allowance (i.e. the reinsurance contract may have coverage on the insurance policy that covers the loss that could be an allowed claim against the Midland policy). The Claim Alert sets forth the allowance amount within a range of which Midland believes the claim could be settled. A very detailed Supplemental Captioned Report stating the reasons for the allowance is prepared by the claims examiner responsible for the claim either prior to or within the 30 to 45 day time period. Midland requests comments and questions from the reinsurers during that period of time and the reinsurer either is mailed the Supplemental Captioned Report with the Claim Alert or the reinsurer may come in to review the claim file and interpose defenses that the reinsurer(s) believes are applicable (or any other input).

Contrary to Everest Re's contentions, Claim Alerts have been mailed to reinsurers (including Everest Re) on all of the claims that have been allowed in the past year (which are the claims involving major policyholders or "MPHs"). Everest Re's complaint is that the Claim Alerts are not specific enough and are misleading. In other words, Everest Re would have asserted different coverage defenses on these claims and is "second-guessing" the Liquidator's decision to settle the claims. However, Everest Re does not tell the Liquidator shat it should do to resolve the claims. Moreover, these claims have been pending against many insurers in the industry for many years and are claims with which Everest Re is extremely familiar from other cedents. Therefore, it (a) knew that these claims were pending in Midland's estate for the past twenty (20) years and (b) knows exactly what its coverage position is with respect to the claims.

As stated, *supra*, "[a] reinsurer cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decision to waive defenses to which it may be entitled." *National Union*, 2006 WL 20897578, slip op. at *3. Midland's allowances have been in good faith, reasonable and within the terms of the policies. Everest Re has not alleged otherwise, only that, had it stood in Midland's shoes, it would have handled the claims in a different manner. *Id.* at *5; *Travelers*, 419 F.3d at 189.

Despite the fact that Everest Re does not like the method that Midland passes its information along to its reinsurers; it is, nonetheless passed along and it is complete information on the claims. Midland prepares a Captioned Report for each claim, whether or not there is an allowance, which outlines all of the specific information that Everest Re states it does not receive.

3. Failure to Provide Claims Information

Everest Re's treaty contracts contain the following pertinent provisions:

Article VIII

> In the event of an occurrence which either results in **or appears to be of serious enough nature as probably to result in a loss involving this Agreement**, the Company **shall give notice as soon as reasonably practicable** to the Reinsurer through Guy Carpenter & Company, Inc., 110 William Street, New York, New York 10038. **Any and all payments made by the Company in settlement of loss or losses under the original policy or policies**, whether in payment of an award or verdict or in satisfaction of a judgment in any Court against the insured or the Company or made voluntarily by the Company before judgment, in full settlement or as a compromise, **shall be unconditionally binding upon the Reinsurer** and amounts falling to the share of the Reinsurer **shall be immediately payable to the Company by it upon reasonable evidence of the amount paid or payable by the Company** being presented to Guy Carpenter & Company, Inc., by the Company. [Emphasis added.]

Article IX

> Any recitals in this Agreement of the terms and provisions of the original policy or policies are merely descriptive and the Reinsurer is reinsuring, to the amounts

herein provided, the obligations of the Company under the original policy or policies. **The Company [Midland] shall be the sole judge as to what shall constitute a claim or loss covered under the Company's original policy or policies and as to the Company's liability thereunder and as to amount or amounts which it shall be proper for the Company to pay thereunder and the Reinsurer shall be bound by the judgment of the Company as to the liability and obligation of the Company under its policy or policies.** [Emphasis added.]

Article XVIII

In the event of the insolvency of the reinsured Company, this reinsurance shall be payable directly to the Company, or to its liquidator, receiver, conservator or statutory successor **on the basis of the liability of the Company** without diminution because of the insolvency of the Company or because the liquidator, receiver, conservator or statutory successor of the Company has failed to pay all or a portion of any claim. It is agreed, however, that the liquidator, receiver, conservator or statutory successor of the Company **shall give written notice to the Reinsurer of the pendency of a claim against the Company indicating the policy or bond reinsured which claim would involve a possible liability on the part of the Reinsurer within a reasonable time after such claim is filed** in the conservation or liquidation proceeding or in the receivership, and that during the pendency of such claim, **the Reinsurer may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be adjudicated any defense or defenses that it may deem available to the Company or their liquidator, receiver, conservator or statutory successor.** The expense thus incurred by the Reinsurer shall be chargeable, subject to the approval of the court against the Company as part of the expense or conservation or liquidation to the extent of a pro rata share of the benefit which may accrue to the Company solely as a result of the defense undertaken by the Reinsurer.

When two or more Reinsurers are involved in the same claim and a majority in interest elect to interpose defense to such claim, the expense shall be apportioned in accordance with the terms of the reinsurance Agreement as though such expense had been incurred by the Company.

The reinsurance shall be payable by the Reinsurer to the Company or to its liquidator, receiver, conservator or statutory successor, except as provided by Section 315 of the New York Insurance Law or except (a) where the Agreement specifically provides another payee of such reinsurance in the event of the insolvency of the Company, and (b) where the Reinsurer with the consent of the direct insured or insureds have assumed such policy obligations of the Company as direct obligations of the Reinsurer to the payees under such policies and in substitution for the obligations of the Company to such payees. [Emphasis added.]

The facultative certificates contain similar language:

> 1. The Company warrants to retain for its own account, subject to Treaty Reinsurance, the amount of liability specified in Section B and **the liability of PRUDENTIAL REINSURANCE specified in Section C shall follow that of the Company and, except as otherwise provided by this Certificate, shall be subject in all respects to all the terms and conditions of the Company's policy** except such as may purport to create a direct obligation of PRUDENTIAL REINSURANCE to the original insured or anyone other than the Company. [Emphasis added.]
>
> 3. Prompt notice shall be give by the Company to PRUDENTIAL REINSURANCE of any occurrence or accident which, without regard to liability, appears likely to involve this reinsurance and while PRUDENTIAL REINSURANCE does not undertake to investigate or defend claims or suits it **shall nevertheless have the right and be given the opportunity to associate with the Company and its representative at PRUDENTIAL REINSURANCE's own expense in the defense and control of any claim, suit or proceeding which may involve this reinsurance with the full cooperation of the Company.** [Emphasis added.]
>
> 4. **All claims covered by this reinsurance**, when settled by the Company, **shall be binding on PRUDENTIAL REINSURANCE which shall be bound to pay its proportion of such settlements.** In addition, PRUDENTIAL REINSURANCE shall pay its proportion of expense (other than Company salaries and office expenses) incurred by the Company in the investigation and settlement of claims or suits as follows:
>
> (a) With respect to reinsurance provided on an excess of loss basis, in the ratio that PRUDENTIAL REINSURANCE's loss payment bears to the Company's gross loss payment.
>
> (b) With respect to reinsurance provided on a pro rata (or quota share) basis, in the ratio that PRUDENTIAL REINSURANCE's limit of liability bears to the Company's gross limit of liability.
>
> PRUDENTIAL REINSURANCE will also pay its proportion of court costs and interest on any judgment or award, such proportion to be on the same basis as set forth in (a) and (b) above, provided PRUDENTIAL REINSURANCE has given prior consent to such trial proceedings. [Emphasis added.]
>
> 5. PRUDENTIAL REINSURANCE's agreement to promptly pay its proportion of loss and expense incurred by the Company is predicated upon receipt by it of a **satisfactory proof of loss and expense from the Company.** [Emphasis added.]

> 9. In the event of the insolvency of the Company, reinsurance under this Certificate shall be **payable by PRUDENTIAL REINSURANCE on the basis of the liability of the Company without diminution because of such insolvency, directly to the Company or its liquidator**, receiver, or statutory successor, except as otherwise provided by law. **PRUDENTIAL REINSURANCE shall be given written notice of the pendency of each claim which may involve the reinsurance afforded by this Certificate within a reasonable time after such claim is filed in the insolvency proceeding**. It shall have the **right to investigate** each such claim and **interpose, at its own expense, in the proceeding where the claim is to be adjudicated, any defense** which it may deem available to the Company or its liquidator, receiver or statutory successor. The expense thus incurred by PRUDENTIAL REINSURANCE shall be chargeable, subject to court approval, against the insolvent Company as part of the expense of liquidation to the extent of a proportionate share of the benefit which may accrue to the Company solely as a result of the defense undertaken by PRUDENTIAL REINSURANCE. [Emphasis added.]

In interpreting reinsurance contracts, New York courts give meaning to every sentence, clause and word of the contract. *Certain Underwriters at Lloyd's of London v. Travelers Cas. And Sur. Co.*, 96 N.Y.2d 583, 594 (Ct. App. 2001), *citing Northville Indus. Corp. v. National Union Fire Ins. Co.*, 89 N.Y.2d 621-632-33. All provisions of the contract, when interpreted together, do not support Everest Re's position that it has been somehow treated unfairly by Midland.

The Notice provision of the contracts require that notice of a claim likely to reach the reinsurer should be provided as soon as reasonably practicable. The Insolvency Clause, on the other hand, which supercedes, provides that Midland "**give written notice to the Reinsurer of the pendency of a claim against the Company indicating the policy or bond reinsured which claim would involve a possible liability on the part of the Reinsurer within a reasonable time after such claim is filed.**" (Emphasis added.) Both provisions call for a reasonableness standard and both provide that the notice is due when there is an indication that the claim would involve possible liability on the part of the Reinsurer. Nowhere does the contract provide that notice was required when proofs of claim ("POCs") were filed in the estate.

The key issue in the long-tail claims involving Midland policyholders is exactly when will the claims "involve a possible liability on the part of the reinsurer." If one believes Everest Re, these claims still do not involve any liability on its part and, therefore, the Liquidator is as yet under no duty to provide it with notice of any claims. Midland's position is that it needs to close the estate in due time and, even though many of the claims may still have some uncertainty, there is a need to resolve those claims for the benefit of all parties involved - - the policyholders, the Liquidator, the State Guaranty Funds and the reinsurers.[3]

Everest Re has asked this Court to enforce their right to interpose a defense in the claims against the Midland estate by filing suit against the Liquidator. There is no need to enforce that right in such fashion as it exists under contract and nobody has acted to deprive Everest Re of that right. To the contrary, the Liquidator has provided notice of each and every claim at least as long ago as 2004 and provided notice again within 30 to 45 days of each allowance. Each notice was supported by a detailed Captioned Report or Supplemental Captioned Report and supporting detail (allocation reports, audit reports, etc.) and any additional information requested by any reinsurer was has been in every case provided. Reinsurers have also been allowed to inspect the Liquidators files in all cases requested, subject to appropriate notice and space availability. Reinsurers were afforded ample opportunity to interpose defenses and in fact have done so by being afforded the right to intervene in the many claims that have been denied for asbestos bodily injury.

The Liquidator does not believe that the right to "interpose a defense" vitiates the provisions of the "follow the settlements" clause in the contracts or changes centuries of case law

[3] Everest Re's argument of late notice is inconsistent with this concept. Late notice, under New York law, carries a heavy burden of proof. *See, e.g., Unigard Security Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 584, 594 N.E.2d 571, 584 N.Y.S.2d 290 (Ct. App. 1992); *Folksamerica Reinsurance Co. v. Republic Ins. Co.*, 2003 WL 22852737 (S.D.N.Y. 2003), slip op. at *9.

on the follow the fortunes doctrine . The notion that a reinsurer who is on the one hand bound to follow the settlements and follow the fortunes of the reinsured has but has, on the other hand, the right to assume control of the claim is a blatant contradiction. Thus it is clear that a reinsurer's right to interpose a defense cannot permit it to avoid all other terms of the contract and take over the role of the Liquidator as insurer.

Everest Re also conveniently overlooks the fact that its contract provides that Midland is the sole judge of what its policies cover and what is a reasonable settlement of the claims. Everest Re's only defense is that the settlement is outside the coverage of the policy – this has not been asserted and cannot be asserted because, while Everest Re may have settled on different terms, it cannot say to this Court that the allowed claims to-date were not, under any circumstances, covered claims. If indeed it has this opinion on the asbestos BI claims, it can bring this up with the Court in the adjunct proceedings. If it somehow has this opinion on allowed claims being billed to it, it need only raise its defenses in Midland's reinsurance collection proceedings. As for future claims, it can bring those up to the Court on a claim-by-claim basis as the contract provides or object when the Liquidator asks the Court for approval of the allowance.

D. Access to Records

Everest Re also complains that it has been denied access to Midland's records. This statement is false and misleading to the Court. Everest Re provides this Court with a story that it made a reasonable request to review documents and was then denied access to same. In truth, Everest Re requested that the files for each of Midland's Major Policyholders (170 insureds with claims including, but not limited to, asbestos property damage and bodily injury, environmental property damage and bodily injury, non-asbestos products such as medical devices and

pharmaceuticals and hospital claims) be made available for its review. Everest Re sought not only to review the files but to scan and retain the files. Midland explained that it would not be possible to provide all of the files at one time as some of the files required review for attorney-client privilege and other reinsurers had already requested the opportunity to audit the claims. In addition, Midland is involved in litigation in California that required these same files be produced in a formal document production.

Regardless, Everest Re was told (ahead of time) that they could have access to the files for a three-week period beginning June 26, 2006 and that they could scan the files. When they arrived on the first day, the scanning equipment had not arrived and they had to retrieve it from Chicago. The review, therefore, did not begin until the fourth scheduled day. At the end of the three-week period, Everest Re's representatives requested additional time. After reviewing the audit schedule, Midland permitted Everest Re to stay an additional three days to complete as much as possible. Everest Re was not removed from the building but was told they would have to leave as they would interfere with the previously scheduled litigation document review and other scheduled audits. They were told to reschedule their audit beginning in September.

Nothing in the reinsurance contracts permits Everest Re to disrupt the normal functioning of the Midland estate. The contracts all generally permit Everest Re "free access to the books and records of the Company at all reasonable times." The Liquidator has no desire or reason to deny Everest Re such access as it desires to get paid for past and future claims and is aware that a review of the records is necessary.[4] However, given the acrimonious nature of the pleadings filed with the court, Midland contacted Everest Re (instead of waiting for Everest Re to reschedule) and was told that Everest Re would need no less than fifteen (15) uninterrupted

[4] At the same time, Everest Re should likewise be honest with this Court and inform the Court that it is fully familiar with most all of the claims in question in that it has acted a reinsurer of these same claims from many other cedents and as a direct insurer in other capacities and has paid these claims in many fashions.

weeks to review the files. In other words, Everest Re's needs come before all other reinsurers who have contracts covering the MPH claims. Nothing about this request is reasonable, especially given the fact that most of Midland's reinsurers require access to these same files. Nonetheless, the Liquidator will offer to copy or electronically "image" many or even all of the files in question pursuant to a cost-sharing arrangement and obviate the need for this recent request.

E. Everest Re's Reliance on *Suter* is Not Relevant to the Instant Case

Everest Re has relied upon a non-final, trial court decision in a state other than New York, in which the actions of the cedent did not even resemble the *proposed* actions of Midland with respect to the *one* policyholder, Pfizer, Inc. The court in *Suter*[5] criticized the actions of the Ms. Suter, the Liquidator of another insurance insolvency, Integrity Insurance Company, because the claims staff of Integrity allowed Pfizer claims without any of its own investigation. Integrity simply reviewed the records of ***some*** of Transit Casualty, another insolvency's, closed Pfizer files and allowed all of Pfizer's "working heart valve" claims thereon.[6] More specifically, Transit Casualty allowed only Pfizer's claims for defense costs for "working heart valve" claims but *not* the four-times greater amounts for indemnity claims that Pfizer paid to such claimants. Integrity allowed *both* defense and indemnity claims.

The *Suter* court did not distinguish between Transit's handling of claims and that of Integrity's. Everest Re criticizes Transit's handling of Transit's handling of the claims but omits the fat that it paid all of the Pfizer claims of Transit Casualty as Transit's reinsurer. Transit was paid for those claims by all of its reinsurers, not only Everest Re. Most importantly, the actions

[5] *Suter v. General Accident Ins. Co.*, Civ. No. 01-2686 (WGB), 2006 U.S. Dist. LEXIS 48209 (D.N.J. July 14, 2006).

[6] The working heart valve claims are claims for "anxiety" related claims when the defective "struts" that hold the mechanical replacement valve do not fracture (usually) resulting in death. The Pfizer claimants filed many claims for anxiety claims even though most of the valves still worked (some continued to fail).

by the Liquidator for Integrity Insurance Company were completely different than those taken for Transit and those contemplated by Midland in its "Claims Alert" sent to Everest Re in what is still a *proposed* allowance.

If Everest Re has input on the problems with the current, *proposed* allowance of the Pfizer claims, and Midland's other reinsurers agree and should Everest Re's input be supported by the facts and the law, Midland will take that input and use it in the allowance process.

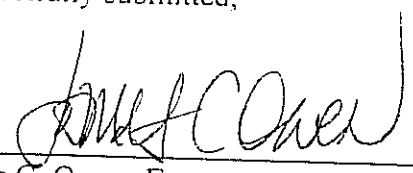
V. Conclusion

The Liquidator has pointed out in detail that Everest Re has an avenue of redress for each and every type of claim that Midland may cede to Everest Re. There is no reason to set aside the permanent injunction.

(INTENTIONALLY LEFT BLANK)

Dated: New York, New York
September 1, 2006

Respectfully submitted,



James C. Owen, Esq.
McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C.
Attorneys for the Superintendent of the New York Liquidation Bureau as Liquidator of Midland Insurance Company
400 South Woods Mill Rd., Suite 250
Chesterfield, MO 63017
(314) 392-5200
(314) 392-5221 (FAX)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

----------X

AFFIDAVIT OF ANDREW STUEHRK IN SUPPORT OF MIDLAND INSURANCE COMPANY'S ANSWER TO EVEREST REINSURANCE COMPANY'S MOTION TO MODIFY INJUNCTION

State of New York)
)
County of New York)

BEFORE ME, the undersigned Notary, Arthur W. Horowitz, on this 31st day of August, 2006, personally appeared Andrew Stuehrk, known to be a credible person and of lawful age, who being by me first duly sworn on his oath, deposes and says:

1. I, Andrew Stuehrk, am Director of Navigant Consulting, Inc. ("Navigant")

2. I am currently retained as a consultant by the Liquidator of Midland Insurance Company in Liquidation ("Midland").

3. I respectfully submit this affirmation in support of Midland's Answer to Everest Reinsurance Company's Motion to Modify the Injunction to Permit Suit Against the Liquidator of Midland.

4. In my capacity as a consultant in the reinsurance department of the New York Liquidation Bureau, I have met with representatives of Everest Reinsurance Company ("Everest Re") in regard to several issues concerning Midland's insolvency.

5. Everest Re requested that it be allowed to audit Midland's claims files. Instead of simply reviewing the files that had been "allowed" (the "paid claims") it sought to review all major policyholder claims that had filed a proof of claim form in Midland's estate. We believe that there are approximately 170 major policyholders. In addition, rather than copying the files, Everest Re asked permission to bring in a vendor to "scan" the files into a digital format.

6. After reviewing the request, Midland determined that it was permissible for Everest Re to scan documents. We did tell them, however, that not all files could be made available at one time because they required review by Midland's attorneys for attorney-client privilege, they were needed for other reinsurance audits and had to be produced as part of a document production in *Mills v. Fremont General Insurance Co.* Everest Re was told that its vendor could have access to the files for 15 business days.

7. On June 26, 2006, Everest Re's vendor, ACS Commercial Solutions, Inc. ("ACS") arrived at Midland to begin the process of scanning the documents. ACS representative, Curtis Klemont, indicated that he would not be able to complete the job in the amount of time that was provided (15 business days) as ACS had accepted the job without taking a complete inventory of what needed to be scanned.

8. ACS was unable to begin the scanning process on June 26th, as its equipment was in Chicago. One of the ACS team went to Chicago to transport the equipment back to New York. He returned to the New York Liquidation Bureau on June 29, 2006.

9. ACS informed Everest Re that it would be unable to complete the job in 15 business days. Thereafter, Jim Wendover from Everest Re spoke with me and Mary Jo Lopez to request additional time to complete the audit.

10. Everest Re was given 3 additional business days to complete the audit.

11. We told Mr. Wendover that they could reschedule the audit at a future date.

12. After Everest Re filed its motion to modify the injunction, we decided that it would be in Midland's best interest to contact Everest Re about rescheduling the audit rather than waiting for Everest Re to contact us.

13. When asked when they wished to reschedule, Mr. Wendover returned an e-mail stating:

> This confirms that Midland will allow Everest to return to the offices of NYLB, pursuant to its contractual right to access Midland's records, on September 18, 2006.
>
> Everest requests that the complete file for each of the 50 MPHs identified in the attached list (in that order) be made available. The list includes all of the MPH files that were previously made available to Everest in July 2006 but were unable to be scanned by Everest before Midland "discontinued" Everest's access to those records on July 19, 2006, as well as several additional MPH files Everest requests be made available at this time.
>
> Please confirm, as soon as possible, that the complete file for each MPH listed will be made available to Everest beginning on September 18, 2006, including any State Fund files, any associated MIDPAC files, and both current and former outside counsel files.
>
> Although Everest anticipates that it will only require approximately fifteen (15) uninterrupted weeks to scan these files, we fully expect, going forward, that Midland will honor Everest's contractual right to access these documents until they are completely scanned, without interruption.

14. Neither I nor anyone working for me told Everest Re to "pack up and leave" but, instead, told them that they would need to reschedule to accommodate other reinsurers who wanted access to Midland's records under their own reinsurance contracts.

Andrew Stuehrk
Navigant Consulting
c/o Midland Insurance Co. in Liquidation
New York Liquidation Bureau
123 William St.
New York, New York 10038

Subscribed and sworn to before me this 31st day of August, 2006

[Seal]

Notary Public

ARTHUR W. HOROWITZ
Notary Public, State of New York
No. 24-1060360
Qualified in Richmond County
Commission Expires Dec. 31, 2009

Typed Name of Notary Public

Notary Public
My Commission Expires:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Liquidation of
MIDLAND INSURANCE COMPANY

Index No. 41294/86

Assigned to:
Hon. Michael Stallman

AFFIDAVIT OF SERVICE –
Answering Affidavits

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STATE OF NEW YORK)
ss)
COUNTY OF NEW YORK)

I, James C. Owen, being duly sworn, depose and say:

1. I am over 18 years of age and am a partner with the law firm of McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C., 400 South Woods Mill Rd., Suite 250, Chesterfield, MO 63017 (314) 392-5200, attorneys for the Liquidator of Midland Insurance Company in Liquidation. I am licensed to practice law in the State of New York.

2. On September 1, 2006, I caused to be served the foregoing Affidavit of James C. Owen in Regarding Answering Affidavits in Opposition to Everest Reinsurance Company's Motion to Modify the Injunction to be served by first-class mail upon the following:

Joseph J. Schiavone
Vincent J. Proto
Budd Larner, P.C.
11 Penn Plaza, 5th Floor
New York, New York 10001

James C. Owen
McCarthy, Leonard, Kaemmerer, Owen, McGovern, Striler & Menghini, L.C.
400 South Woods Mill Rd., Suite 250
Chesterfield, MO 63017
(314) 392-5200
(314) 392-5221 (Facsimile)

Subscribed and sworn to before me this 31st day of August, 2006.

Notary Public 4-18-08

ELIZABETH J. FAIRES
Notary Public - State of Missouri
ST. LOUIS COUNTY
My Commission Expires April 18, 2008

INDEX NO.: 41294 YEAR 1986

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

In The Matter of

The Liquidation of

MIDLAND INSURANCE COMPANY

AFFIDAVIT OF JAMES C. OWEN REGARDING ANSWERING AFFIDAVITS IN OPPOSITION TO EVEREST REINSURANCE COMPANY'S MOTION TO MODIFY INJUNCTION

JAMES C. OWEN, ESQ.
Attorney for Superintendent of Insurance as Liquidator

Office and Post Office Address, Telephone

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McGOVERN, STRILER & MENGHINI, L.C.
400 SOUTH WOODS MILL ROAD, SUITE 250
CHESTERFIELD, MO 63017

ATTORNEY CERTIFICATION

The undersigned, an attorney admitted to practice in the courts of New York state, certifies that, upon information, belief and reasonable inquiry, the contentions in the above referenced document(s) are not frivolous.

Dated: September 1, 2006
New York, New York

James C. Owen

Yours etc.

JAMES C. OWEN, ESQ.

Attorney for Superintendent
Of Insurance as Liquidator

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